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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-45

GERALD A. LEWIS, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida,

Appellant,

—vs—

BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION,

Appellees,

ON APPEAL FROM THE UNITED STATES THREE-JUDGE DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

MOTION TO AFFIRM AND BRIEF

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BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION,

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MOTION TO AFFIRM AND BRIEF

MOTION TO AFFIRM

Appellees, B. T. Investment Managers, Inc. and Bankers Trust New York Corporation, pursuant to Rules 16 and 35 of the Rules of the Supreme Court of the United States, move the Court to affirm the judgment sought to be reviewed on appeal, on the ground that the questions on which the decision of the cause depends are so unsubstantial and well-settled as not to need further argument.

The facts upon which this motion is based are set forth in the Statement of the Case, appearing at pages 6 through 12, *infra*.

BRIEF IN SUPPORT OF MOTION TO AFFIRM

Opinion Below

The opinion of the United States Three-Judge District Court for the Northern District of Florida dated November 15, 1978, is reported at 461 F. Supp. 1187 (N.D. Fla. 1978), and is set forth at Appendixes A-1 and B-1 of Appellant's Jurisdictional Statement. The Order of March 22, 1979, altering and amending the Order of December 15, 1978, is not reported, but is reprinted in Appendix D-1 to Appellant's Jurisdictional Statement.

Jurisdiction

The appeal herein is from a Final Order made and entered in the United States District Court for the Northern District of Florida by a three-judge court convened

pursuant to 28 U.S.C. § 2281 (1970).[1] That Order declares unconstitutional and enjoins the enforcement of a portion of Section 659.141(1), Florida Statutes (1977); and declares unconstitutional Section 660.10, Florida Statutes (1977). Both statutes were found to be violative of Article I, § 8, Cl.3 (the Commerce Clause) of the United States Constitution.

The Final Order was issued and Opinion entered on December 15, 1978, and was altered and amended, in part, on March 22, 1979. Notice of Appeal was filed May 11, 1979, in the United States District Court for the Northern District of Florida.

It is acknowledged that the Supreme Court of the United States is specifically given the *power* to hear this appeal by 28 U.S.C. § 1253 (1976), pertaining to appeals from decisions of three-judge courts. It is equally clear, however, that under both the Court's own Rules and prior decisions, this Court is not required to exercise that power, where the arguments raised on appeal are frivolous and so clearly disposed of by prior precedent as to require no further argument. Rule 16(1)(c), Rules of the Supreme Court of the United States, provides in pertinent part:

> "Rule 16. Motion to dismiss or affirm.
> 1. Within thirty days after receipt of the jurisdictional statement . . . the Appellee may file a printed . . . motion to affirm.
>
> * * *

1/ 28 U.S.C. § 2281 (1970) was repealed by Pub.L. 94-381. However, this repealer was expressly inapplicable to any action commenced on or before August 12, 1976. Thus, the repealer does not affect the statutory jurisdiction of the Court over this appeal.

> (c) The court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

This Court earlier expressed the same principle in the case of *Enrique Del Pozo y Marcos v. Wilson Cypress Company*, 269 U.S. 82 (1925). There the Court noted that a motion to dismiss the appeal was not proper inasmuch as the appeal taken was admissible under then existing jurisdictional statutes; but nonetheless granted the alternative motion to affirm because the issues raised on appeal were clearly disposed of by prior precedent. The Court stated:

> "No question is presented which can be regarded as debatable in this court, so there is no need for holding the case for further argument." 269 U.S. at 90.

Similarly, in *Hodges v. Snyder*, 261 U.S. 600 (1923), the Court held that inasmuch as the trial court's construction and application of the due process clause were clearly in conformity with the recent pronouncements of this Court, the question raised on appeal did not require further argument, and the motion to affirm should be granted.

Again, in *Milheim v. Moffat Tunnel Improvement District*, 262 U.S. 710 (1923), the Court denied a motion to dismiss a due process attack upon a state legislative act creating a tunnel improvement district, but granted a motion to affirm, stating that:

> "The motion to affirm the judgment should, however, be granted, if the questions on which the decision depends are found to be so wanting in substance as not to need further argument." 262 U.S. at 717.

The Court found that the judgment of the Supreme Court of California was "plainly right," and affirmed that judgment.[2]

As is further amplified below, the questions posed by this appeal and the arguments raised in the Jurisdictional Statement are so unsubstantial and so clearly foreclosed by prior decisions of this Court that no further argument is necessary, and the Motion to Affirm should be granted.

Constitutional Provision, Statutes, and Rules Involved

1. Article I, § 8, Cl.3 United States Constitution. Congress shall have power . . . to "regulate commerce . . . among the several states . . ."

2. Section 659.141(1), Florida Statutes (1972 Supp.). (The full text of the statute is set forth in appendix B-1 hereto).

3. Section 659.141(1), Florida Statutes (1977). (The full text of the statute is set forth in the Jurisdictional Statement, appendix C-1.)

2/ In more recent cases, the Court has seen fit to grant motions to affirm in memorandum opinions. *See, e.g., Sowervine v. United States*, 431 U.S. 961 (1977) (appeal from the decision of a three-judge District Court); *Williams v. Democratic Party of Georgia*, 409 U.S. 809 (1972).

4. Section 660.10, Florida Statutes (1977). (The full text of the statute is set forth in the Jurisdictional Statement, appendix C-1.)

5. 12 U.S.C. § 1841(b) and (c) (1976). (The full text of the statute is set forth in appendix B-2 hereto.)

6. 12 U.S.C. § 1842 (1976). (The pertinent portion of the statute is set forth in appendix B-2 hereto.)

7. 12 U.S.C. § 1843(c)(8) (1976). (The full text of the statute is set forth in the Jurisdictional Statement, appendix C-5.)

8. 12 U.S.C. § 1846 (1976). (The full text of the statute is set forth in the Jurisdictional Statement, appendix C-7.)

9. 12 C.F.R. § 225.4(a)(4) and (5) (1978). (The full text of the regulations is set forth in the Jurisdictional Statement, appendix C-7.)

10. 12 C.F.R. § 225.4(b)(1) (1978). (The full text of the regulation is set forth in appendix B-3 hereto.)

Questions Presented

1. Whether the three-judge court below was correct in holding that § 660.10, Florida Statutes (1977), forbidding out-of-state companies from exercising certain fiduciary powers in Florida, and § 659.141(1), Florida Statutes (1977), prohibiting only those bank holding companies with a principal place of activity outside Florida from owning or controlling trust or investment advisory offices in Florida, discriminate against interstate commerce and are, therefore, invalid under the Commerce Clause of the United States Constitution.

2. Whether the three-judge court below was correct in holding that the provisions of the Bank Holding Company Act, 12 U.S.C. §§ 1842(d) and 1846 (1976), did not authorize the Florida Legislature to discriminate against interstate commerce as that Legislature did by the passage of § 659.141(1), Florida Statutes (1977).

Statement of the Case

Appellee, BANKERS TRUST NEW YORK CORPORATION (hereinafter "Bankers Trust") is a corporation organized under the laws of the State of New York, and is a "bank holding company" within the meaning of the Bank Holding Company Act, 12 U.S.C. § 1841 *et seq*. Appellee BT INVESTMENT MANAGERS, INC. (hereinafter "BT Investment") is a corporation organized and incorporated on November 24, 1972, under the laws of the State of Delaware, and is a wholly-owned subsidiary of Bankers Trust. BT Investment qualified under the laws of the State of Florida to do business in Florida on November 27, 1972.

Section 4(c)(8) of the Bank Holding Company Act, 12 U.S.C. § 1843(c)(8) (1976), authorizes a bank holding company, with the approval of the Board of Governors of the Federal Reserve System (hereinafter "Board") to acquire the shares of any company the activities of which the Board has determined to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. The Board has provided by regulation that "[p]erforming or carrying on any one or more of the functions or activities that may be performed or carried on by a trust company" and "acting as an investment or financial advisor" are such activities. 12 C.F.R. §§ 225.4(a)(4) and (5) (1978).

On October 3, 1972, Bankers Trust applied to the Board pursuant to 12 U.S.C. § 1843(c)(8) and 12 C.F.R. § 225.4(b)(1) (1978), for authority to engage through its proposed subsidiary, BT Investment, from an office located in Palm Beach, Florida, in acting as an investment and financial adviser. At that time, the contemplated activity was not prohibited by Florida Statutes.

At the time of that application, § 659.141(1), Florida Statutes (1972 Supp.), generally prohibited any bank, trust company, or holding company, the operations of which are principally conducted outside Florida, from acquiring or retaining all or substantially all of the assets of, or control over, any business organization having a place of business in Florida which furnishes investment advisory services *to trust companies or banks in Florida.* Objections were filed to Appellees' application by both the Comptroller of the State of Florida (Appellant herein) and the Florida Bankers Association (hereinafter "FBA") (amicus curiae below). Following the filing of these objections Appellant and FBA actively pursued a legislative course designed to protect the local business interests from which the membership of FBA is drawn.

While Appellees' application was pending, the Governor of the State of Florida called the Legislature into special session, in order to consider legislation concerning capital punishment and other subjects unrelated to this litigation.[3] Largely at the urging of Appellant and FBA, and in direct response to Appellees' pending

3/ The Proclamation of the Governor is contained at Vol.1, Laws of Florida, 1973, p.1, and sets forth the purview of the matters for which the special session was called by the Governor.

application,[4] the Legislature of the State of Florida hurriedly enacted an amendment to § 659.141(1), Florida Statutes (1972 Supp.)[5] extending its prohibition of the furnishing of investment advisory services so as to preclude Appellees from rendering such services to "any person" rather than, as theretofore, only to Florida trust companies and banks.

On April 26, 1973, the Board issued an order denying Appellees' proposal to act as an investment adviser. The Board's Order states in pertinent part:

> "Absent the recent enactment of amendments to Section 659.141 and any evidence indicating that *de novo* entry in this case would have the purpose

4/ In its Order Denying Proposal to Act as an Investment Adviser, the Board found:
"It is beyond question, and BTNYC and the protestants are in agreement, that the notice that BTNYC published in September, 1972, triggered the action of the Florida Legislature in this case and that the newly-enacted legislation was primarily motivated by the threat of BTNYC's entry into the Florida investment advisory markets and was intended to prevent such entry." Federal Reserve Board Order of April 26, 1973, Fed.Res.Bull. 364, 366 (1973)

5/ House Bill 25-A was admitted for introduction in the Florida House of Representatives on November 29, 1972, Journal of the Florida House of Representatives, p.25 (November 29, 1972); was placed on the House Special Order Calendar on November 30 without having been heard or subjected to substantive analysis by any committee, Journal of the Florida House of Representatives, p.28 (November 30, 1972); and was passed by the House of Representatives and immediately certified to the Florida Senate that same day, Journal of the Florida House of Representatives, pp.29-30 (November 30, 1972). The Bill was taken up out of order and passed on the floor of the Florida Senate that same day, Journal of the Florida Senate, p.21 (November 30, 1972). It then became Chapter 72-726, Laws of Florida (1973), without the Governor's signature.

or effect of foreclosing future competition or would otherwise be contrary to the public interest, it appears likely that the Board would have approved the instant proposal. * * * However, while the instant proposal was pending before the Board, the Florida Statutes were amended to generally prohibit the provision of investment advisory services in Florida by non-Florida-based bank holding companies through control of business organizations having offices in Florida." 59 Fed.Res.Bull. 364, 365 (1973).

Though the Board recognized the Florida Legislature's action as an attempt to prevent out-of-state competition,[6]

6/ Throughout its Order Denying Proposal to Act as an Investment Adviser, the Board reiterated its conclusion that the 1972 amendment to § 659.141(1) was intended to protect Florida interests from out-of-state competition in general and from Appellees in particular. At page 365 of its Order, the Board noted the congressional recognition that the de novo entry of bank holding companies into a new market would have procompetitive effects. The Board found, however, that the 1972 amendment was intended to preclude Bankers Trust from engaging in this competition. The Board stated:

"There appears to be tacit agreement that the recently -enacted legislation was intended to, and does, prohibit the performance of investment advisory services in Florida by non-Florida bank holding companies." *Id.* at 365.

The Board also noted that:

"[T]he legislative history of the legislation evidences a legislative intent to exclude BTNYC from engaging in the provision of investment advisory services in a Florida office." *Id.*at 366.

"Reviewing this order and the findings of the Board in their entirety, the Fifth Circuit Court of Appeals noted in *BT Investment Managers, Inc. v. Lewis*, 559 F.2d 950, 954 n.13 (5th Cir. 1977):

Reviewing the circumstances of the enactment of the amendment to *Fla. Stat.* § 659.141(1), the Federal Reserve Board minced no words in characterizing the Florida Legislature's action as a brazen attempt to prevent out-of-state competition."

it nonetheless held that, solely because of the amendment to the Act, it was required to disapprove the Appellees' application,[7] and that it did not have the judicial power requisite to passing on Appellees' contention that such an act was unconstitutional.[8]

On November 13, 1973, Banker's Trust petitioned the United States Court of Appeals for the Second Circuit for review of the Order of the Federal Reserve Board denying its proposal to act as an investment adviser. The petition has been withdrawn with leave of the court to reinstate at the option of petitioner pending the outcome of the instant litigation.

It was stipulated by the parties that but for the existence of the challenged statutes, Bankers Trust would have applied to the Board of Governors of the Federal Reserve System for authority to engage, through a subsidiary, in the activity of performing or carrying on at a place of business in Florida one or more of the activities

7/ The Board stated:

"In brief, since the Board is of the opinion that the proposal is prohibited by State law it believes that, under the doctrine set forth by the U. S. Supreme Court in *Whitney*, it must deny the proposal." *Id.* at 366.

8/ The Board stated:

"The Board is not unsympathetic with BTNYC when that holding company questions the fairness and legality of a procedure whereby the proponents of this legislation could prevent [its] proposal from becoming effective by filing objections with the Board and requesting a hearing and then, after hasty enactment of legislation, argue that this very legislation should be the basis for the Board to bar approval of [its] proposal." *Id.* at 366.

However, the Board had previously noted:

"BTNYC's challenge to the constitutionality of any provision of the recently - enacted Florida legislation is properly cognizable only by the judiciary." *Id.* at 366.

or functions that may be performed or carried on by a trust company in a manner authorized by Florida law but without the power to accept demand deposits or make commercial loans; and would have organized such a trust company under the laws of the United States or the State of Florida.[9]

This action was commenced to secure a judicial declaration and injunction restraining enforcement of these statutes.

Shortly after commencement of the action, Appellant moved to dismiss based upon the "abstention" doctrine arguing, *inter alia*, that the federal court should abstain from ruling on the constitutionality of these statutes until their possible application to Appellees had been determined by the courts of Florida. Though this motion was granted by the three-judge court, the Fifth Circuit Court of Appeals noted that this contention was "in view of Appellee's role in blocking approval of Appellant's application . . . frankly speaking, incredible," and reversed and remanded so that the three-judge court could pass on the constitutionality of the statutes. *BT Investment Managers, Inc. v. Lewis*, 559 F.2d 950, 954 n.13 (5th Cir. 1977). The court stated:

> "Indeed by their very terms the challenged statutes could scarcely be clearer in effect, if not in purpose — that is, to rid Florida banking and trust interests of non-Florida competition in the area of investment counseling." *Id.* at 954.

After extensive briefing and argument on the merits, the three-judge court held that § 660.10 and the first sentence of § 659.141(1) were patently discriminatory

9/ Stipulation filed May 11, 1978 at pp.2-3.

against out-of-state concerns and that the record conclusively indicated that the legislation was *per se* unconstitutional as contemplated by this court in the recent case of *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). In the instant case the three-judge court stated:

> "The record here, though sparse, is sufficient to indicate conclusively the discriminatory nature of the statutes under attack. By its terms, Section 659.141(1) erects an insuperable barrier to the entry of foreign-based bankholding companies, through their subsidiaries, into the Florida investment advisory market. Section 660.10 similarly cordons off Florida trust companies from competition by out-of-state concerns. Thus, according to *Philadelphia v. New Jersey, supra*, this parochial legislation must be deemed per se unconstitutional." 461 F. Supp. at 1196.

It is from this order that the Comptroller of the State of Florida has appealed.

Summary of Argument

Section 660.10, Florida Statutes (1977), prohibits certain otherwise similar banks and companies from performing certain trust and fiduciary duties based solely upon whether they are incorporated or located inside or outside the State of Florida. Similarly, § 659.141(1), Florida Statutes (1977), prohibits only those bank holding companies having a principal place of operation outside Florida from owning or controlling any organization which operates a trust company or an investment advisory service office in this state.

Inasmuch as these two statutes both on their face and patently discriminate based on out-of-state origin or principal place of business, they are *per se* violative of the Commerce Clause of the United States Constitution. The "balancing approach" which has in some cases saved legislation having a legitimate local purpose and only incidentally burdening interstate commerce cannot be invoked to save these statutes, because they are patently and facially discriminatory; these discriminatory features promote no legitimate local interest; and the burden imposed by the statutes is not incidental but effectively amounts to one of total prohibition.

The argument of Appellant — that § 659.141(1) was properly enacted pursuant to congressional authorization in the Bank Holding Company Act of 1956 to discriminate against interstate commerce in the acquisition of investment advisory service organizations in Florida — constitutes an admission that that statute was intended to be discriminatory, as argued above. That argument is further erroneous in that the portion of the Bank Holding Company Act relied upon by Appellant authorizes states to discriminate against interstate commerce *only* in the acquisition of *banks* and contains no such authorization to discriminate in the acquisition of companies other than banks, which acquisitions are a focus of § 659.141(1).

In spite of the numerous false issues suggested by Appellant in an attempt to render the clear unconstitutionality of the above statutes at least debatable in this Court, the questions on which the decision of the cause depends are so unsubstantial and well-settled as not to need further argument.

Argument

THE QUESTIONS RAISED BY THIS APPEAL ARE WELL SETTLED BY BOTH LONG-STANDING AND RECENT PRECEDENT, AND ARE SO UNSUBSTANTIAL AS TO RENDER FURTHER ARGUMENT UNNECESSARY

The correctness of the three-judge court's ruling is clearly settled and practically nondebatable in light of the clear realities that:

I. Sections 659.141(1) and 660.10, Florida Statutes (1977), both on their face and in effect, overtly discriminate against interstate commerce based solely upon factors of out-of-state origin, and are therefore *per se* unconstitutional;

II. The "balancing approach" of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), is not reached, and if reached does not save these statutes; and,

III. The admitted discrimination of § 659.141(1) Florida Statutes (1977), against interstate commerce is clearly not authorized by the Bank Holding Company Act.

In the course of discussing the correctness of these three broad points Appellees will dispose of various false issues raised by Appellant and by Amicus Curiae, Conference of State Bank Supervisors (hereinafter "Bank Supervisors"), in futile attempt to render the clear correctness of the lower court's orders debatable in this Court. Simply because these false issues are numerous and at times

attenuated and complex, they should not be allowed to obfuscate or require further argument in this Court as to the obvious propriety of the above points and the three-judge court's holding.

I.

THE CHALLENGED STATUTES, BOTH ON THEIR FACE AND IN EFFECT, OVERTLY DISCRIMINATE AGAINST INTERSTATE COMMERCE BASED SOLELY UPON FACTORS OF OUT-OF-STATE ORIGIN, AND ARE THEREFORE *PER SE* UNCONSTITUTIONAL

This Court's recent decision in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), rendered shortly before the three-judge court's resolution of this matter on the merits, was the subject of separate briefs by each of the parties herein, and was analyzed in detail by that court. Though strikingly similar to the instant controversy in all material respects, that decision was certainly not novel, but was merely a recent re-expression and summary of the long-standing protection afforded to interstate commerce from local economic protectionism and discrimination.

Before scrutinizing in detail the statute to be examined in that case, the Court in *Philadelphia* reiterated the axiom that it is the aim of the Commerce Clause to preserve a truly national economy. Quoting from *H. P. Hood and Sons, Inc. v Du Mond*, 336 U.S. 525, 537-38 (1948), the Court in *Philadelphia* stated:

> "This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control the economy, including the vital power of erecting custom barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin v. Seelig*, 294 U.S. 511, 527, what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation." 437 U.S. at 623.

Indeed the Court must presently go no further than a facial reading of the challenged statutes to discern their violation of these principles. If, for example, § 659.141(1) were enacted in all states of the nation, not only would Appellees be precluded from having trust and investment advisory services in Florida, but Appellees and all other bank holding companies would be similarly prohibited from offering these services through offices of subsidiaries in any other state save only the one where the majority of their services were offered. Every state would be discriminating against the bank holding companies of every other state. Thus, the restriction imposed by statute is directly antagonistic to the maintenance of a national economic unit, and clearly tends to promote isolationism.

At pages 623 through 624 of *Philadelphia*, the Court traced its historical vigilance to the evils of "economic isolation and protectionism" while at the same time recognizing that "incidental burdens on interstate commerce may be unavoidable when a state legislates to safeguard the health and safety of its people." The Court further noted at page 624 that "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected," and found at page 624 that "the clearest example of such legislation is a law

that overtly blocks the flow of interstate commerce at a state's borders."

Application of these long-standing principles to the challenged statute is so clear as to foreclose further debate. Every impartial forum that has reviewed the challenged Florida Statutes, and which was familiar with the history of their enactment has concluded that they are a blatant form of overt economic isolationism.[10] Indeed, it is difficult to imagine how Appellant and Bank Supervisors can suggest to this Court that these statutes are not discriminatory, inasmuch as they later attempt to convince the Court that § 659.141(1), Florida Statutes (1973), was intended to be discriminatory pursuant to a (wrongly perceived) congressional authorization to burden interstate commerce.[11]

As noted by this Court in *Philadelphia* the crucial inquiry:

> ". . . must be directed to determining whether [the statute under scrutiny] is basically a protectionist

10/ In regard to the findings of the Board and the Fifth Circuit Court of Appeal, see n.6, *supra*. The three-judge court reached an identical conclusion at 461 F. Supp. at 1196, quoted herein at p.12, *supra*.

11/ At pages 9-13 of the Jurisdictional Statement, and 14-20 of Bank Supervisors' brief, Appellant and Bank Supervisors argue strenuously and at length that § 659.141(1) is constitutional because it was enacted pursuant to a congressional authorization to infringe on interstate commerce in an otherwise constitutional fashion. While the fallacies in that argument are dealt with in greater detail, *infra*, it must here be noted that such argument is a direct admission that this statute is in fact discriminatory, and renders any contrary assertion incredible.

> measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Id.* at 624.

Further, the Court stated that whatever the state's ultimate purpose,

> "it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, *apart from their origin*, to treat them differently." (Emphasis added). *Id.* at 626-27.

Just as the Court concluded in *Philadelphia*, *id.* at 628-29, both on their face and in plain effect the challenged statutes violate this principle of nondiscrimination.

In the present case, this discrimination based purely on origin fairly leaps from the face of the statutes. As to § 659.141(1), the statute does *not* purport to generally prohibit the providing of investment advisory or trust services, nor does it evenhandedly provide a common scheme of regulation or prohibition to the rendering of such services by bank holding companies or their subsidiaries. Instead, it blatantly provides that only those bank holding companies *whose operations are principally conducted outside of this state* are precluded from controlling business organizations having a place of business in this state from which they furnish investment advisory services in this state.

Neither that statute itself, nor any evidence in the record, nor the fertile imagination of counsel has suggested any reason (other than the impermissible one of

out-of-state origin) to discriminate between trust and investment advisory services rendered by subsidiaries under the control of a holding company whose principal activities are conducted outside Florida, and those rendered under the control of an identically structured company whose principal activities are conducted inside Florida.

Similarly, § 660.10 both on its face and in effect discriminates among otherwise identical entities based upon purely geographic factors, in determining whether those entities shall be prohibited from exercising the enumerated power and duties.

These statutes are blatantly and clearly discriminatory, and *per se* violations of the general and long-standing prohibitions summarized in *Philadelphia*.

A comparison of the facts in *Philadelphia* with the instant legislation introduces no doubt or debate as to the above conclusion. In *Philadelphia* the purported evil sought to be regulated by the state statute was the accumulation of waste. In the instant case, the only justification yet proposed for § 659.141(1) generally is that it is part of the state's attempt to preclude an accumulation and concentration of economic wealth and power in specified institutions, primarily holding companies.[12] Assuming arguendo that such an evil exists (as

12/ In the instant case, a review of the Jurisdictional Statement and the Brief of Bank Supervisors fails to suggest any specific evil that § 659.141(1) is designed to avoid. Thus, it is difficult to dispute whether such evil actually exists and whether or not § 659.141(1) is designed to avoid it. The closest Appellant or Bank Supervisors come to suggesting a specific evil is the general inference that this statute was enacted pursuant to a perceived congressional intent to minimize the concentration of economic power.

the Court was willing to assume in *Philadelphia*), the Court very properly held in *Philadelphia* that inasmuch as the economic unit was the Nation, it was impermissible for the statute to impose *only* on *out-of-state* interests the full burden of solving that problem. Similarly, in the instant case, if concentration of economic power in holding companies is the evil feared, then it is impermissible for Florida to cast the full burden of that problem upon out-of-state interests.[13] To be constitutional, (other issues aside) such regulation would have to apply evenhandedly to entities whose principal place of operation was inside the state as well as to those outside.

Appellant and Amicus Curiae attempt to divert the Court's attention from those discriminatory features which are repugnant to the Commerce Clause by focusing instead on other non-geographic discriminatory factors also contained within the statutes. In discussing § 660.10,

13/ Even if the existence of such a problem is assumed, it is clear that these statutes are not directed at solving it. The centralization and accumulation of economic influence is in no way precluded by these statutes but is merely reserved for the Florida bank holding conglomerate to the exclusion of non-Florida competitors. Likewise, the subject statutes do not attempt to regulate or control the activities dealt with (investment advisory services or trust activities). Rather, they attempt to differentiate based on the principal place of activity of the corporations that would be performing those activities, all of which corporations would admittedly be subject to state control and regulation. Again, the purpose of the statute is not to insure the state's ability to regulate, but rather to protect and isolate local interests from interstate competitors. Thus, both the purpose and the effect of the subject statutes are exactly opposite to solving the problem suggested by Appellant and Bank Supervisors. The statutes both in purpose and effect actually encourage and facilitate the concentration and accumulation of the financial oligopoly existing in Florida by insulating the oligopoly against the pro-competitive effect of Appellees' proposed *de novo* activities.

at page 13 of the Jurisdictional Statement, for example, Appellant emphasizes that certain prohibitions apply to "all corporations . . . except Florida corporate trust companies *with trust powers*. . . ." (Emphasis in original). By emphasizing application of the general prohibition to all corporations except those with trust powers, Appellant seeks to divert attention from the fact that among members of that limited class of state banks and trust companies which are authorized to possess trust powers, there exists the unconstitutional discrimination herein against those members which do not happen to be incorporated in Florida, and which may not be incorporated in Florida by virtue of § 659.141(1). Similarly, in discussing § 659.141(1) at pages 11-12 of its Brief, Bank Supervisors argues that the statute does not discriminate purely based on geography inasmuch as it "would not prevent a non-banking out-of-state corporation from opening an investment advisory service in Florida." This diversion again ignores the facial reality that among those business entities which are in all other material respects identical, the statute discriminates against some based upon purely in-state/out-of-state considerations. The fact that these considerations of origin are determined by principal place of activity as opposed to place of incorporation makes this geographic factor no less burdensome or discriminatory in impeding the flow of commerce into the state.

Another false issue suggested by Appellant and Bank Supervisors is the notion that holding these statutes unconstitutional would substantially undermine the dual system of banking regulation. They suggest that striking these statutes would in effect deprive the states of the right Congress has left to them to regulate participation in

the financial community within their borders,[14] and, would also impinge on the state's regulation of trust and fiduciary duties within their borders.[15] These arguments

14/ Throughout the Brief of Bank Supervisors and the Jurisdictional Statement (*see, e.g.*, Brief of Bank Supervisors at 7 and Jurisdictional Statement at 20) Appellant and Bank Supervisors express profuse concern for the effect of the three-judge court's opinion on the entire field of banking regulation in Florida. This broad brush paranoia is absurd in light of the legislative history of § 659.141(1), Florida Statutes. Appellant and Bank Supervisors fail to note that the broad and absolute prohibition of that present statute did not even exist as a part of Florida's banking regulations prior to its hurried enactment in direct response to Appellees' application. Since Florida had successfully regulated banking activities for many years prior to the 1972 amendment it is ludicrous to suggest that the entire regulatory scheme is dependent on that amendment.

15/ In its argument in support of the constitutionality of § 660.10, at pp.13-16 of the Jurisdictional Statement, Appellant bemoans that:

> "In holding § 660.10, Fla. Stat., unconstitutional, the lower court struck down a statute which had been the governing law of Florida for over 50 years, and which is similar to statutes enacted in other jurisdictions for similarly lengthy periods."

Similarly, Bank Supervisors in its appendix at p.21, lists several statutes from other states which it asserts would be jeopardized by the decision of the court below. The three-judge court properly disposed of this purported justification for the Florida statute.

> "A statute's longevity or commonplace nature, however, is an insufficient rationale for justifying its demonstrated discrimination against interstate commerce." 461 F. Supp. at 1201 n.12.

Conspicuously absent from the Jurisdictional Statement is any assertion whatsoever of a legitimate local concern or regulatory need that is promoted by that statute. Indeed, as set forth in great length in the Stipulation filed May 11, 1978, at pp.1-3, quoted herein at p.29, *infra*, it has been stipulated by the parties that Appellees are already subject to all reasonable regulations imposed by the State of Florida. Thus, simply because this unconstitutional statute has been on the books for a number of years, that longevity is irrelevant when no local regulatory need is facilitated by the discriminatory features of it.

incorrectly characterize Appellees' position and the effect of the three-judge court's order. Appellees have in no way contended, and that court did not order, that dual regulation must be abolished or that the states cannot reasonably regulate in the general areas addressed by §§ 659.141(1) and 660.10.[16] *Philadelphia v. New Jersey* clearly states and Appellees fully recognize that "in the absence of federal legislation, these subjects are open to control by the states so long as they act within the restraints imposed by the Commerce Clause itself." 437 U.S. at 623. In other words, the states remain completely free to regulate *in a nondiscriminatory fashion.*[17]

In further attempt to inject some debate as to the constitutionality of these patently discriminatory statutes, both the Appellant and Bank Supervisors have raised the

16/ The ability of the State of Florida to reasonably regulate the proposed activities of Appellees has never been an issue in this litigation. As set forth in greater detail at 29 *infra*, all parties have stipulated that in the conduct of their business in Florida Appellees would be subject to any and all regulatory requirements reasonably imposed by the State of Florida.

17/ The three-judge court fully recognized the right of the Florida Legislature to engage in reasonable regulation, as opposed to discriminatory prohibition. That court stated:

> "Florida unquestionably may act by legislation to control or prevent undue concentrations of economic power in the banking, investment, and trust businesses. In order not to run afoul of the Commerce Clause, though, this legislation must impact evenhandedly upon in-state and out-of-state firms alike. § 659.141(1) and § 660.10 place the full weight of the purported state concern for competition upon foreign companies, leaving unchecked any possible abuses by Florida corporations. Where, as here, there is no evidence beyond simple speculation that foreign companies pose any greater danger to competition than do Florida firms, the former may not be singled out for prohibition." 461 F. Supp. at 1197-98.

case of *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117 (1978). In fact, a proper reading of that case further establishes the unconstitutionality of these statutes. This is so because the patent and facial discrimination obviously present in the instant statutes was specifically noted to be absent in the statute there scrutinized, and because the factors held essential to the saving of that statute are clearly not present here. Appellant is accurate in its summary, at page 19 of the Jurisdictional Statement, that:

> "In *Exxon, supra*, this court upheld a Maryland statute which prohibited *any corporation* that produced or refined petroleum products from operating a retail service station within the state." (Emphasis added).

Obviously, that statute was not on its face discriminatory as the present ones are, and as it would have been had it applied by its terms only to any corporation "the operations of which are principally conducted outside the state." Conversely, the present constitutional attack would not have been made if the Florida statute effectively omitted that discriminatory qualification.

Though the impact of the regulations scrutinized in *Exxon* was solely on out-of-state concerns (and this impact was separately evaluated in *Exxon* at pages 125-128, as to whether it was merely incidental on one hand or an impermissible burden on commerce on the other), that statute by its terms applied evenhandedly to all identically organized distribution systems, and made no patent distinctions among otherwise identical concerns based solely on geography. This discrimination among otherwise similar objects of regulation, based solely on origin,

is the fatal defect that was specifically found to exist in *Philadelphia v. New Jersey;* which exists in the statutes now scrutinized; and which was found *not* to exist in *Exxon.*

This very distinction was considered sufficiently significant by the Court in *Exxon* to merit specific reference. The Court stated:

> "In fact, the Act creates no barriers whatsoever against interstate independent dealers; it does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market. *The absence* of any of these factors fully distinguishes this case from those in which a state has been found to have discriminated against interstate commerce." (Emphasis added) *Id.* at 126.

Conversely, examination of the instant statutes reveals that the *presence* of these same discriminatory factors mandates the conclusion that they are unconstitutional. In *Exxon,* the Court noted an absence of barriers against interstate dealers in the act there considered. In contrast, the statutes involved here create insuperable barriers against out-of-state concerns, by barring them from rendering their services from offices in Florida in the case of § 659.141(1), and by barring them from performing certain services at all in the case of § 660.10. Similarly, while there was no prohibition on the flow of interstate goods in *Exxon,* or the placing of added costs upon them, the flow into Florida of the personal and professional services regulated by § 660.10 is totally prohibited; and the investment advisory and trust services addressed by § 659.141(1) are impeded *and* rendered more expensive

by requiring them to be provided impersonally and from afar. Finally, though the Court in *Exxon* found that there was no distinction between in-state and out-of-state companies in the retail market, both § 659.141(1) and § 660.10 patently and on their face distinguish between otherwise identical in-state and out-of-state companies in their respective service markets.

It was only after noting the absence of these patently discriminatory factors that the Court in *Exxon* undertook to analyze whether or not the differing impact on out-of-state concerns was merely incidental, or constituted an *impermissible* burden on interstate commerce. By this analysis, the Court found that, though the regulation there would cause some businesses to shift from one interstate supplier to another, this incidental effect of an "otherwise valid regulation" was permissible. 437 U.S. at 127.

The obvious prerequisite to this analysis, consistently ignored by Appellant and Bank Supervisors, was a specific finding that the distribution system that was therein prohibited had in fact led to the inequitable distribution of gas during shortage periods, and the Act was generally "designed to correct the inequities in the distribution and pricing of gasoline" that were ascribed to that form of distribution. *Id.* at 121. In contrast, the present statute does not legislate generally and evenhandedly against a specified form of business organization to remedy a specific evil attendant to that organization. It instead discriminates between organizations of *identical*

structure[18] based solely on geographic origin.

II.

THE "BALANCING APPROACH" OF *PIKE v. BRUCE CHURCH* IS NOT REACHED, AND IF REACHED DOES NOT SAVE THESE STATUTES

Bank Supervisors further opines at page 12 of its Brief that the court below should have applied the "balancing approach" of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Bank Supervisors then incorrectly formulates this balancing test as entailing an evaluation of only three factors:

> "Under *Pike*, the court below should have begun its evaluation of each Florida statute by identifying: (1) a local purpose served by the statute; (2) the degree of burden placed on interstate commerce by the statute; and (3) any practical alternatives which would provide the same local benefit with less burden on interstate commerce." Brief of Bank Supervisors at 12.

This statement is in marked contrast to this Court's own formulation in *Pike* of the "balancing approach."

> *Where the statute regulates evenhandedly to effectuate a legitimate local interest, and its effects on interstate commerce are only incidental,* it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to putative local benefits. [Citations omitted]. If a legitimate local purpose is found, then the question becomes one of degree. The extent of the burden that will be tolerated will, of course, depend on the nature of the local interests involved, and on whether it could be promoted as well with a lesser impact on interstate commerce. Occasionally, the court has candidly undertaken a balancing approach to solving these issues . . . ." (Emphasis added). 397 U.S. at 142.

18/ *i.e.*, all bank holding companies seeking to render trust and investment advisory services in Florida through subsidiaries having a place of business in Florida from which they would furnish trust and investment advisory services in Florida in the case of § 659.141(1); and certain trust companies and national banking associations having trust powers in the case of § 660.10.

The formulation of Bank Supervisors incorrectly presumes without discussion the initial qualification for this test. Bank Supervisors would thereby have this Court ignore that the "balancing approach" will be applied only "[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental. . . ." As reiterated in *Philadelphia v. New Jersey*, this analysis applies only "where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade . . ." 437 U.S. at 624.

The instant statutes obviously fail to pass muster under any of these qualifications. Initially, it is impossible to say the statutes "regulate evenhandedly" when both §§ 659.141(1) and 660.10 on their face discriminate against otherwise identical objects of regulation based upon in-state and out-of-state considerations. Because of this facial discrimination these statutes fail the "no patent discrimination" test articulated in *Philadelphia* as being a prerequisite to the application of *Pike*. 437 U.S. at 624.

Additionally, the record is totally devoid of any argument that the challenged portions of the statutes effectuate any local public interest whatsoever by treating in-state and out-of-state concerns differently. There has been no evidence, or even contention, that the outright prohibitions against the out-of-state concerns are related to any difficulties in subjecting those concerns to reasonable regulation as to their in-state conduct. Indeed, it has been *stipulated* that: (1) BT Investment is "qualified under the laws of the State of Florida to do business in Florida;" (2) BT Investment is, "amenable to process issued by the courts of the State of Florida, and is ready, willing and able to comply with all lawful statutory, regulatory or supervisory provisions governing the conduct of the investment advisory business in Florida . . .;" and (3) Bankers Trust is "ready, willing and able to comply with all lawful statutory, regulatory or supervisory provisions governing the conduct of the trust business in Florida."[19] Particularly in light of the stipulated ability of the State of Florida to subject these out-of-state concerns to all legitimate regulations as to in-state conduct, any public interest in prohibiting only out-of-state concerns is illusory.

An argument that the effects of these statutes on interstate commerce are "only incidental" is ludicrous in light of the patent prohibitions contained in the words of the statute. Appellant argues at page 19 of the Jurisdictional Statement that § 659.141(1) "does not prohibit the flow of interstate services" because "non-banking corporations whose principal place of business are out of the state may

19/ Stipulation filed May 11, 1978, at pages 1-3.

supply investment advisory services." This argument ignores the reality that only those bank holding companies which are out-of-state are prohibited from, through their subsidiaries, opening investment advisory offices *in Florida* and that the advisory services to be rendered are highly personal and professional in nature, and to be performed at all, must be rendered expeditiously and in person.

These statutes clearly do not have the requisite qualifications for reaching the balancing test. However, even if that test were reached, these statutes would fail, as the local interest preserved by the discrimination is nil, and the burden imposed amounts to one of total prohibition.

III.

THE ADMITTED DISCRIMINATION OF SECTION 659.141(1), FLORIDA STATUTES, AGAINST INTERSTATE COMMERCE IS CLEARLY NOT AUTHORIZED BY THE BANK HOLDING COMPANY ACT.

At page 14 of its Brief, Bank Supervisors argues that §§ 3(d) and 7 of the Federal Bank Holding Company Act of 1956, 12 U.S.C. §§ 1842(d) and 1846 (1976), "specifically authorize" states to adopt laws such as § 659.141(1). Apparently recognizing that such a claim of specific authorization is exceedingly strained, Appellant contends that the Bank Holding Company Act "includes an *implied* authority for a state to prohibit or exclude entry . . ." as Florida has attempted to do through this statute. Jurisdic-

tional Statement at 9 (emphasis added).[20] It is clear from the plain meaning of these statutes that such grant of authority is neither expressed nor implied.

Appellees do not contest that Congress has the power to authorize the states to regulate interstate commerce in specified ways that would otherwise be impermissibly burdensome or discriminatory. In reviewing the statutes cited as granting such authorization, however, Appellant and Bank Supervisors have apparently misconstrued mere *limitations* on the pre-emptive effect of other federal regulatory statutes as affirmative grants of authority by Congress.

Bank Supervisors, at pages 18-20 of its Brief, argues that 12 U.S.C. § 1846 (1976) did not merely announce a Congressional intention not to pre-empt state law, but "was an affirmative grant of power to burden interstate commerce in an otherwise unconstitutional manner." This argument is inconsistent with the plain meaning of that section. Section 1846 provides:

> "The enactment by Congress of this chapter shall not be construed as preventing any state from exercising such powers and jurisdiction which it

20/ Appellant's argument at pp. 8-12 of the Jurisdictional Statement does not even purport to justify the burden imposed on interstate commerce by § 660.10. Indeed, since Appellant contends § 660.10 has been on the books for over 50 years, it would not have been possible for this statute to have been enacted pursuant to a perceived congressional authorization enacted in 1956.

By arguing that § 659.141(1) was enacted pursuant to a perceived congressional authority to discriminate against interstate commerce, both Appellant and Bank Supervisors admit that this statute is intentionally discriminatory.

> now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof."

By its plain meaning, this proviso is not an affirmative grant of authority, but states nothing more than what the chapter shall "*not* be construed" to mean. (Emphasis added).[21]

In the instant case, Appellees have never contended that the scrutinized statutes invade areas pre-empted by federal regulation and fully acknowledged that whatever residuum of regulatory power the states have shall be exercised consistent with the preexisting limitations imposed by the Commerce Clause, *i.e.*, that such power may not

21/ *See, e.g., Great Western United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds* (venue), ____U.S.____, 47 U.S.L.W. 4844 (June 26, 1979), which held that language similar to 12 U.S.C. § 1846 was intended only to negate an inference that Congress had generally pre-empted the securities law field from state regulation. In the absence of a specific delegation to regulate commerce (which admittedly exists here in 12 U.S.C. § 1842(d), but only as to the acquisition of *banks*), such clauses are mere expressions that the states may continue to exercise pre-existing power, or power "hereafter" acquired, and do not of themselves expand that pre-existing power so as to authorize burdens on interstate commerce.

As quoted from *Great Western* in the opinion of the three-judge court, 461 F. Supp. 1187, 1199:

> "When Congress has exempted state laws from Commerce Clause restrictions it has used language specifically directing that certain interstate commerce may be regulated as though it were purely local. . . ."

Holding that language similar to that of § 1846 was not such a specific delegation of power, the court in *Great Western* stated:

> "Rather than allowing violations of the Commerce Clause, § 28 appears to direct only that Federal Securities law should not be interpreted as a wholesale displacement of state securities regulation." 577 F.2d at 1281.

be exercised to discriminate against interstate commerce. In applying these principles to the language of the Bank Holding Company Act, it is clear that such Act and amendments to it affirmatively authorize the states to preclude a bank holding company from acquiring only any additional *bank* in that state, 12 U.S.C. § 1842(d) and that the Congress has expressly refrained from pre-empting the entire field of regulation of bank holding companies, 12 U.S.C. § 1846. However, the mere statement by § 1846 that no federal pre-emption was intended does not in any way expand the original authorization, which allows states to prohibit only the acquisition of *banks.*[22]

22/ At page 19 of its Brief, Bank Supervisors argues that the case of *Commercial National Bank v. Board of Governors,* 451 F.2d 86 (8th Cir. 1971) stands for the proposition that § 1846 constitutes an affirmative authorization for the states to discriminate against or burden interstate commerce in an otherwise unconstitutional manner. That case had nothing to do with whether or not § 1846 constituted an affirmative authorization to burden interstate commerce. Indeed, the Commerce Clause is not even mentioned in it.

In that case, the sole issue was whether or not the application which had been approved by the Board was in fact violative of the Arkansas branch banking statute. The Court in dictum noted that "Arkansas is free to prohibit, by specific legislation, the formation of bank holding companies." 451 F.2d at 89. However, that statement was merely made in the context of whether or not Congress intended the Bank Holding Company Act to pre-empt Arkansas' pre-existing ability to regulate formation of bank holding companies within its borders.

Nowhere is there even an inference of a constitutional attack on or analysis of that statute. Even had such analysis been undertaken, however, it should be noted that the statute examined herein does not purport to evenhandedly apply to all branch banking, or all bank holding companies, as did the Arkansas statute. Instead, the Florida statute blatantly discriminates against only those bank holding companies with a principal place of operation outside Florida.

The Bank Holding Company Act in 12 U.S.C. § 1842(d) requires that the Board may not approve any application by a bank holding company or subsidiary thereof to acquire any interest in

> "any additional *bank* located outside of the state in which the operations of such bank holding company's banking subsidiaries were principally conducted on the effective date of this amendment . . . unless, the acquisition . . . is specifically authorized by the statute laws of the state in which such bank is located. . . ." (Emphasis added). 12 U.S.C. § 1842(d).

Appellees acknowledge that Congress has affirmatively barred out-of-state holding company acquisition of banks unless specifically authorized by the states.[23] However, nowhere in the act are the states authorized to bar or discriminate as to acquisitions of companies other than banks.

23/ One clear example of a state statute enacted pursuant to the authorization of 12 U.S.C. § 1842(d) is § 524.1805, Iowa Code (1979 Cum. Supp.). That statute provides:

> "Nothing in this division shall be construed to authorize a bank holding company which is with respect to the state of Iowa an 'out-of-state bank holding company', as defined or referred to in 12 U.S.C. § 1842(d), as amended to January 1, 1971, to acquire any of the voting shares of, any interest in, all or substantially all of the assets of, or power to control in any manner the election of any of the directors of any bank in this state, unless such bank holding company was on January 1, 1971 registered with the federal reserve board as a bank holding company, and on that date owned at least two banks in this state."

Contrary to the assertion of Bank Supervisors that this and several other state statutes enacted pursuant to § 1842(d) are jeopardized by the opinion of the court below, Brief of Bank Supervisors, Appendix, page 21, this statute is vastly different

(continued next page)

Having apparently recognized that § 656.141(1) is (contrary to their earlier assertions) discriminatory against interstate commerce, Appellant and Bank Supervisors go to great lengths in attempts to raise a "construction" that in 12 U.S.C. § 1842(d), Congress really meant more than it said, and also intended to authorize discrimination as to those *other companies* that holding companies may legally acquire.

It is well settled as a matter of statutory interpretation that where the words of a statute are clear, there is no occasion to "construe" those words and the statute will be given its plain and ordinary meaning. *See, e.g., Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 201 (1976). In this regard, it is difficult to imagine how Congress could have employed any clearer language in this somewhat complex area. The intent is apparent from the language:

23/ *(continued)*
from the Florida one. The Iowa statute, which pertains only to ownership or control of "any bank in this state" is directly keyed to the authorization of 12 U.S.C. § 1842(d). In contrast, § 659.141(1), Florida Statutes, goes far beyond the parameters of the Iowa statute and the authorization of § 1842(d) by attempting to prohibit acquisitions not only of banks, but of other companies such as those performing trust and investment advisory services as well.

Bank Supervisors ignores this distinction, and similar distinctions between the Florida Statute and others which Bank Supervisors lists in its Appendix as endangered by the lower court's holding. Inasmuch as the fate of these other statutes is neither before this court nor relevant to the constitutionality of the obviously discriminatory Florida Statute, see n.15, *supra,* the record will not be further burdened by an analysis or distinction of these statutes.

(1) Holding companies may in some circumstances acquire banks, (12 U.S.C. § 1842) and may in some circumstances acquire other companies, 12 U.S.C. § 1842-1843; (2) by 12 U.S.C. § 1842(d) Congress prohibited the acquisition of "banks" across state lines without specific permission of the states; (3) nowhere in either §§ 1842 or 1843 is there expressed an authorization to states to discriminate as to other acquisitions.[24]

24/ It is recognized that Congress has the *power* to phrase its authorizations to burden commerce very generally. For example, Congress *could have* stated in the Bank Holding Company Act that no holding company could be relieved from compliance with any state law regulating bank holding companies on the ground that the holding company was engaged in interstate commerce. Such a general delegation was employed by Congress in statutes examined in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), and *Prudential Insurance Co. v. Benjamin,* 328 U.S. 408 (1946). Even simpler, Congress could have, as discussed below, merely used the word "company" in § 1842(d) instead of the word "bank." Thus, Congress could have easily and directly authorized the states to probibit acquisitions by bank holding companies of "any additional company" as opposed to the much narrower authorization to prohibit acquisitions of "any additional bank." Section 1842(d) eschews this general authorization and specifically extends only to allowing states to probibit acquisition of banks.

At pages 14 through 17 of its Brief, Bank Supervisors correctly states that Congress has the power to authorize state burdens on interstate commerce and that Congress has authorized this power in the instance of acquisitions of "any additional bank," but then incorrectly posits the issue as follows:

> "Since Congress authorized states to discriminate against out-of-state holding companies the next question is how specifically it limited the authorization." Brief of Bank Supervisors at 17.

The language of § 1842(d) contains no such *general* authorization to discriminate, but only the *limited* one to discriminate as to acquisitions of banks. Thus, Bank Supervisors incorrectly leaps from a limited authorization to the assumption of a general one, and then inquires as to what limitations exist on the wrongly posited general authorization. Rather than examining the extent of the limited language of § 1842(d), the analysis of Bank

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The Bank Holding Company Act very clearly recognizes that bank holding companies have the power to acquire interests in companies other than banks. Specifically, 12 U.S.C. § 1843 fully recognizes and extensively restricts "interests in non-banking organizations" which organizations are clarified to be "any company not a bank."[25] It is therefore obvious that the Bank Holding Company Act contemplates that holding companies may in different specified circumstances acquire interests in both "banks" and "companies not banks," and that states are authorized to discriminate against out-of-state holding companies only in the acquisition of "banks" within the state.

The differing treatment afforded to acquisitions of "banks" and acquisitions of "any company not a bank" has always permeated the Bank Holding Company Act. Though all acquisitions by bank holding companies are covered within the Act, the differing treatment afforded

24/ *(continued)*
Supervisors would have this court ignore this initial inquiry. The plain meaning of § 1842(d) extends only to the acquisition of banks, and nowhere in the Bank Holding Company Act is there any authorization for the states to discriminate against interstate commerce in the acquisition of companies other than banks.

25/ Pursuant to 12 U.S.C § 1843(c)(8) the Board has determined at 12 C.F.R. §§ 225.4(a)(4) and (5) that certain trust company functions and acting as an investment or financial advisor are business activities "so closely related to banking . . . as to be a proper incident thereto." Subject to other qualifications, stated in the Bank Holding Company Act, non-banking companies involved in such closely related activities may be acquired by bank holding companies. Thus, entities which exist to offer investment advisory services, such at BT Investment, are clearly among those "non-banking organizations" which a bank holding company may acquire.

to acquisitions of "banks" and acquisitons of other "companies" is initially facilitated by the statement of very disparate definitions of those terms. It is evident from such definitions, contained in 12 U.S.C. § 1841(b) and (c), that the term "company" is defined expansively to emcompass practically any perpetually existent business entity.[26] The term "bank" on the other hand, is more explicitly defined in § 1841(c) to emcompass only those entities with specific attributes, primarily the accepting of deposits that may be withdrawn on demand, and engaging in the activity of making commercial loans.[27]

These definitions facilitate and are clearly used to provide different regulatory treatment as to the circumstances under which a bank holding company may acquire "any additional bank," § 1842(d), and the circumstances under which a bank holding company may

26/ The term "company" is presently defined as follows:
"(b) 'Company' means any corporation, partnership, business trust, association, or similar organization, or any other trust unless by its terms it must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the effective date of the trust, but shall not include any corporation the majority of the shares of which are owned by the United States or by any State.***"

27/ That definition provides:
"(c) 'Bank' means any institution organized under the laws of the United States, any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans. Such term does not include any organization operating under Section 25 or section 25(a) of the Federal Reserve Act, or any organization which does not do business within the United States except as an incident to its activities outside the United States."

acquire interests in "any company not a bank," § 1843.[28]

To argue that § 1842(d), which by its clear terms authorizes states to prohibit acquisitions only of "any additional bank", was really intended to authorize the states to prohibit acquisitions of any additional bank *or other company engaged in closely related activities*, as Bank Supervisors argues at page 18, is directly inconsistent with these definitions, and with the different sets of regulatory requirements pertaining to these separate types of acquisitions. Similarly, Appellants erroneously argue at Jurisdictional Statement page 10, that allowing acquisitions of closely related companies in circumstances where the states are authorized to prohibit only acquisition of "banks" is a "loophole" in the law. This argument ignores

28/ This differing regulatory treatment clearly appears from both the titles and substantive provisions of § 1842 and § 1843. The title of § 1842 is "Acquisition of *bank* shares or assets — prior approval of Board as necessary; exceptions." (Emphasis added). This is contrasted with the title of § 1843 which reads "Interests in non-banking organization — ownership or control of voting shares of any *company not a bank;* engagement in business *other than* that of banking."

The congressional usage of words cannot be taken lightly and such usage was presumptively determined by resort to the definitions that Congress took pains to include in the statute. Clearly, if Congress had intended § 1842 to govern the acquisition of both banks and other companies which are not banks it would have been a simple matter for Congress to have provided in § 1842, and specifically sub-section (d) of that section, that it apply to the acquisition of "any additional *company.*" Instead, Congress provided that such sub-section should apply only to the acquisitions of assets of "any additional *bank.*" In contrast, it is § 1843 which by its own specific terms addresses the circumstances under which bank holding companies may acquire interest in "any company not a bank." Totally absent from that section is any authorization to a state to prohibit or discriminate in such acquisition.

the fact that Congress specifically afforded different definitions to facilitate a distinction between banks and other companies, and utilized this distinction for the purpose of relegating to the states the authority to totally prohibit the acquisition of banks, while retaining a separate federal statutory scheme as to the regulation of acquisition of all other companies.

By resort to misreading of definitions, exceptions to definitions, and legislative history, Appellants and Bank Supervisors attempt by convolution to establish that when Congress spoke of acquisition of "any additional bank" in § 1842(d), it really meant "any additional bank or other company that a bank holding company might attempt to acquire." This expansion is as inconsistent with those definitions and legislative history as it is with the plain meaning of § 1842(d). Again, the term "bank" is defined in 12 U.S.C. § 1841(c) (1976) as:

> "Any institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand and (2) engages in the business of making commercial loans."

Bank Supervisors asserts that those institutions which are not actually engaged in "commercial banking" are excluded from this definition of "bank." At pages 17 and 18 of its Brief, Bank Supervisors then makes an attenuated argument that since activities such as investment advisory services might be contemplated by the term "commercial banking," investment advisory services do not fall within the exclusion from the definition and must therefore somehow be included within the original definition of a bank. This circumlocution ignores the direct reality that in proposing to establish an investment advisory service

in Florida, Appellees do not attempt to acquire "any additional bank" because the institution to be established does not meet the basic definition of "bank," to wit, that institution does not accept deposits that a depositor has a legal right to withdraw on demand, and it does not engage in the business of making commercial loans.[29]

29/ Aside from the fact that Bank Supervisors' circumlocution is internally illogical (in that it asserts the non sequitur that merely because investment advisory services do not come within the "exclusion" from the definition of "banks," these activities must necessarily fall within the inclusive terms of the definition) even a cursory reading of the committee report relied upon by Bank Supervisors demonstrates that comments from the committee report are taken badly out of context so as to lead the reader to the incorrect conclusion as to the effect of the amendment.
From the plain meaning of the 1970 Amendment and the committee report, it is clear that the amendment to the definition of "bank" in 1970 had the intended effect of *narrowing* that definition, *not expanding* it. Prior to 1970, that definition did not include the qualification that, in order to be considered a bank, an institution must be one that made commercial loans. The addition of that qualification in 1970 very clearly restricts that definition (and the concomitant authority granted to the states to engage in discriminatory prohibitions of acquisition of "banks") to apply only to those institutions which make commercial loans and thereby control commercial credit — where the potential for economic concentration is the greatest. Speaking of this change, the committee report notes:

"Banks as defined in the Act must accept demand deposits and engage in the business of making commercial loans. The definition of 'bank' adopted by Congress in 1966 was designed to include commercial banks and exclude those institutions not engaged in commercial banking, since *the purpose of the Act was to restrain undue concentration of commercial banking resources and to prevent possible abuses related to the control of commercial credit*. However, the Federal Reserve Board has noted that this definition may be too broad and may include institutions which are not in fact engaged in the business of commercial banking in that they do not make commercial loans. The committee, accordingly, adopted a provision which would exclude institutions that are not engaged in the

(continued next page)

The attempt of Bank Supervisors to extend the clear term "bank" to include investment advisory services by resort to *Iowa Independent Bankers v. Board of Governors*, 511 F.2d 1288 (D.C.Cir. 1975) *cert. denied* 423 U.S. 875 (1975), is similarly futile. Though that case is quoted by Bank Supervisors at page 18 of its Brief, for the broad proposition that § 1842(d) was enacted to "assure that the states had sufficient power to control the expansion of bank holding companies across state lines so that such expansion would not contravene state policy," it is clear from a reading of the case that the expansion contemplated was the acquisition of "banks." The statute under scrutiny there is quoted at n.23, *supra*. That statute, just as § 1842(d) itself, dealt *only* with acquisitions of "banks." 511 F.2d at 1972.

At pages 8 thru 12 of the Jurisdictional Statement, Appellant further argues that the three-judge court wrongly construed the 1970 amendments to the Bank Holding Company Act of 1956, stating:

> "The court below seems to reject the Appellant's contention that the 1970 amendments did not change the original congressional purpose behind

29/ *(continued)*
business of making commercial loans from the definition of "bank." (Emphasis added). S.Rep. No. 1084, 91st Cong., 2d Sess. 24, *reprinted in* [1970] *U.S. Cong. & Ad. News* 5519, 5541.
Thus, contrary to the conclusion reached by Bank Supervisors Code by taking this "commercial banking" exclusion out of context, the 1970 Amendment was clearly intended to *narrow* the definition of "bank" and further demonstrates that Congress intended to specifically and restrictively define that term as it is used throughout the Bank Holding Act.

> enactment of the Bank Holding Company Act of 1956, which was to limit the concentration of economic power in the hands of bank holding companies. . . ." Jurisdictional Statement at 12.

This "red herring" is a clear mischaracterization of the three-judge court's holding. Indeed, before discussing the effect of the 1970 amendments, the court concluded that "defendant and amicus are correct concerning the general intent of the Act (preventing the concentration of financial power by bank holding companies) . . ." 461 F. Supp. at 1200. The three-judge court simply recognized that, consistent with all the legislative history of the Bank Holding Company Act and its amendments, acquisition of "any additional bank" under 12 U.S.C. § 1842, and acquisition of interest in "any company not a bank" under 12 U.S.C. § 1843 are separate regulatory provisions.[30]

Appellees never argued and the three-judge court did not find that the general purpose of the 1956 Act has

30/ Indeed, review of the entire committee report furnishes even further support for Appellees' contention that Congress intended two schemes of regulation — one as to acquisitions of banks, and one as to acquisitions of companies other than banks. In reviewing its own prior report as to the original 1956 Act, the committee states:

> "That report indicated that there were two primary problems involved with bank holding companies. One was the unrestricted ability of such a company to obtain banking units, thereby concentrating the commercial bank facilities in a particular area under a single control. The other was the combination, again under a single control, of banking and nonbanking enterprises." 1970 *Cong. & Ad. News* at 5520.

Thus, the committee's intent clearly comports with the plain meaning of the Act, in that even though the Act covers acquisitions by bank holding companies of "banks" and of other "companies" it clearly recognizes these two areas are separate legislative "problems," and deals with them separately.

changed. Rather, the 1970 amendments eliminated one of the major statutory restrictions previously existing as to companies that could be acquired, and thus evidenced a congressional intent to liberalize acquisitions by holding companies of companies other than banks.[31] This liberalization is plainly inconsistent with any argument that the 1956 Act had "impliedly" authorized the states to completely prohibit acquisition by holding companies of companies other than banks.

The three-judge court apparently agreed with Appellees' reading of the 1970 amendments. Since that court determined that authority to acquire interests in companies other than banks was being congressionally expanded, it simply concluded that such expansion was inconsistent with raising an implication that the word "bank" as used in 12 U.S.C. § 1842 even authorized the states to engage in total prohibition as to such acquisitions.

31/ Prior to the 1970 amendments, one of the restrictions contained in 12 U.S.C. § 1843(c)(8) was that bank holding companies could be allowed to obtain interests only in companies other than banks "all activities of which are of a financial, fiduciary, or insurance nature . . ." By deleting this pre-existing restriction in 1970, the Congress plainly and significantly expanded the types of companies which might qualify for possible acquisition by bank holding companies. Reaching a similar conclusion as to the liberalizing effect of the 1970 amendments on non-bank acquisitions, *see, National Couriers Association v. Board of Governors*, 516 F.2d 1229, 1236-37 (D.C. Cir. 1975); Chase, *The Emerging Financial Conglomerate: Liberalization of the Bank Holding Company Act*, 60 Geo. L.J. 1225 (1972); Comment, *Implementation of the Bank Holding Company Act Amendments of 1970: The Scope of Banking Activities*, 71 Mich. L. Rev. 1970 (1973); Legis. Note, *The Bank Holding Company Act Amendments of 1970*, 39 Geo. Wash. L. Rev. 1200 (1971).

The three-judge court's interpretation is completely consistent with the case of *Investment Company Institute v. Board of Governors of the Federal Reserve System*, ____F.2d____, Case No. 77-1862 (D.C.Cir. March 30, 1979) discussed at pages 11-12 of the Jurisdictional Statement.[32]

Indeed, while Appellant is technically correct in stating that the decision of *Investment Company Institute* "was not available at the time [the three-judge court] entered its judgment and its order altering the judgment . . .," Jurisdictional Statement at 11, such an assertion is somewhat misleading in that *Investment Company Institute* was the subject of extensive briefing in support of and in opposition to the Appellant's later Motion to Suspend Injunction and Stay Judgment. Thus, the three-judge court had full opportunity to consider this decision and did consider it in denying that motion.

Completely aside from the clear correctness of the three-judge court's reading of the 1970 amendments,

32/ In *Investment Company Institute, supra,* the D.C. Circuit specifically acknowledged that (for reasons of legislative history that need not be discussed here) deletion of certain other language which had been contained in the 1956 Act "significantly liberalized the strictures of § 4(c)(8)." *Id.* at 32. It was this same Circuit which had recently concluded after a review of the "seemingly slight" 1970 amendments that they were indeed a major liberalization. The court stated in *National Couriers Association v. Board of Governors of the Federal Reserve System,* 516 F.2d 1229, 1236 (D.C.Cir. 1975):

> "Though the precise amount of the intended increase in the latitude to be given the bank holding companies is something of a puzzle, *it is plain that Congress intended to expand that latitude in substantial degree.*" (Emphasis added).

however, it is also apparent that the lower court addressed only the circumstances under which a bank holding company can acquire an interest in "any company not a bank." There is nothing in the wording of those amendments to suggest abolition of the previously existing dichotomy wherein acquisition of banks is dealt with in 12 U.S.C. § 1842(d) and acquisitions of "any company not a bank" is governed by § 1843. Thus, aside from the fact that circumstances for acquisition of companies other than banks were being expanded by the 1970 amendments, those amendments were also a reaffirmation that Congress intended to perpetuate a separate set of restrictions as to acquisitions of "any company not a bank" and that such companies are not impliedly subsumed within the term "bank," in § 1842(d).

Conclusion

Sections 659.141(1) and 660.10, Florida Statutes (1977), are patently discriminatory against interstate commerce. As to § 659.141(1), Appellant and Bank Supervisors admit in their arguments that it was intentionally enacted pursuant to a perceived congressional authorization to discriminate. As such, these statutes are *per se* violative of the Commerce Clause of the United States Constitution. Neither debate nor further argument will alter this inescapable result.

Additionally, by the plain meaning of the Bank Holding Company Act, it is clear that the states have not been authorized to discriminate against out-of-state bank holding companies in their otherwise legal acquisitions of companies other than banks, and that the Bank Holding Company Act does not save these unconstitutionally discriminatory enactments.

Therefore there is no question, substantial or otherwise, as to the correctness of the three-judge court's Order and Opinion, no further argument is required, and the Motion to Affirm should be granted.

Respectfully submitted,

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Date: August 24, 1979

1. The entire text of the Federal Reserve Board's Order Denying Proposal to Act as an Investment Adviser is set forth herein.

BANKERS TRUST NEW YORK CORPORATION, NEW YORK, NEW YORK

Order Denying Proposal To Act As An Investment Adviser

Bankers Trust New York Corporation, New York, New York ("BTNYC"), a bank holding company within the meaning of the Bank Holding Company Act, has proposed under § 4(c)(8) of the Act and § 225.4(b)(1) of the Board's Regulation Y, to engage indirectly *de novo* in the performance of certain investment advisory activities, through B T Investment Managers, Inc., Palm Beach, Florida ("BTIM"), a wholly-owned subsidiary of BTNYC.

Notice of the proposal, affording opportunity for interested persons to express or submit comments and views on the proposal, has been published (September 25, 1972, *The Wall Street Journal* and September 26, 1972, West Palm Beach *Commercial Record)* in accordance with § 225.4(b)(1) of the Board's Regulation Y. The time for filing comments and views has expired, and all those received, including those of the Comptroller of Florida, the Florida Bankers Association, and the Palm Beach County Bankers Association, Inc. have been considered in light of the factors set forth in § 4(c)(8) of the Act (12 U.S.C. 1843(c)(8)). Among those letters commenting on the proposal were requests for a hearing: those persons seeking a hearing were asked what substantial issues of

material fact, if any, were presented by the instant proposal and why any issues raised could not be resolved by the submission of written comments. Prior to receipt of responses to these questions, the Board was apprised that on November 30, 1972, the Florida Legislature enacted legislation[1] that became effective on December 21, 1972.

1/ The legislation amended section 659.141 of the *Florida Statutes*. Section 659.141, as amended, provides, in pertinent part:

659.141(1) Control; ownership.—

(1) Except as provided in subsection (3) of this section no bank, trust company, or holding company, the operations of which are principally conducted outside this State, shall acquire, retain, or own, directly or indirectly, all or substantially all the assets of, or control over, any bank or trust company having a place of business in this State where the business of banking, or trust business or functions are conducted or acquire, retain or own all or substantially all of the assets of or control over, any business organization having a place of business in this State where or from which it furnishes investment advisory services in this State. However, if a bank, trust company, or holding company directly or indirectly owning all or substantially all the assets of, or having control over a bank or a trust company or business organization to which the restrictions and prohibitions of this section apply, having acquired such assets or control prior to becoming disqualified hereunder, shall, on or after the effective date of this section be or become disqualified hereunder to acquire, retain or own the same, the restrictions and prohibitions of this section shall not be enforced against it for a period which, under all the circumstances, is determined by the department to be reasonable, not exceeding two years from the effective date of this Act or from the date it becomes disqualified hereunder, whichever is later, unless said period of two years is extended by the department as herein provided. The department is authorized, upon a showing of undue hardship, to extend said period of two years from time to time if the department determines that any such extension would not be detrimental to the public interest, but any such extension shall not exceed one year and all thereof shall not in the aggregate exceed three years.

* * *

(Continued next page)

Subsequently, the Board entertained briefs and written argument on the issue of the applicability and effect of the amended statute on the instant proposal from those persons that had requested to be heard.

Absent the recent enactment of amendments to section 659.141 and any evidence indicating that *de novo* entry in this case would have the purpose or effect of foreclosing future competition or would otherwise be contrary to the public interest,[2] it appears likely that the Board would have approved the instant proposal. The Board recognizes, as has Congress, "that an activity commenced *de novo* will tend to have pro-competitive effects, and consequently should be viewed more favorably than the commencement of an activity through the acquisition of an existing concern"[3] and "where a bank holding company enters a new market *de novo* . . . , its desire to succeed in its new endeavor is more likely to be

1/ *(Continued)*

(2) . . .

(c) A business organization provides investment advisory services if, in this State for compensation, it engages in the business of advising persons, as defined in § 1.01(3), Florida Statutes, either directly or indirectly or through publications or writings, as to the value of securities or as to the advisabilty of investment in or purchasing securities, or if, not being a certified public accountant, in this State and for compensation it issues or distributes to persons, as defined in § 1.01(3), Florida Statutes, analyses or reports concerning securities.

2/ See the Board's Order of March 6, 1973, denying the application of First at Orlando Corporation to acquire shares of Citrus First National Bank of Leesburg, 38 *Federal Register* 6317 (March 8, 1973) and the Board's Statement accompanying its Order of March 9, 1973 approving, to the extent permitted by State law, the proposal of NCNB Corporation to engage in certain trust activities in South Carolina through American Trust Company, 1973 Federal Reserve BULLETIN 305.

3/ *S. Rep.* No. 91-1084, 91st Cong., 2d Sess. 16 (1970).

competitive."[4] However, while the instant proposal was pending before the Board, the Florida Statutes were amended to generally prohibit the provision of investment advisory services in Florida by non-Florida-based bank holding companies through control of business organizations having offices in Florida. The legislation further provides however that the restrictions and prohibitions contained therein shall not be enforced for a period of time ranging up to five years against any holding company which, prior to the effective date of such legislation, acquired control over a business organization to which the restrictions or prohibitions of the statute apply.

There appears to be tacit agreement that the recently-enacted legislation was intended to, and does, prohibit the performance of investment advisory services in Florida by non-Florida bank holding companies. However, BTNYC has contended that, under the "grandfather" provision in the statute, BTIM may open for business and engage in the provision of investment advisory services for a period of approximately two years. The protestants to the proposal, with the concurrence of the Comptroller of Florida, have contended that the "grandfather" benefit, conferred by the newly-enacted legislation, is not available to BTNYC or BTIM. However, assuming, without deciding, that the construction given the "grandfather" provision by BTNYC is correct, the Board perceives, as a possible adverse effect of the instant proposal, the indefinite and temporary nature of BTIM's performance of investment advisory services. The public is ill-served by a firm offering investment ad-

4/ *H. R. Rep.* No. 91-1747, 91st Cong., 2d Sess. 17 (1970).

visory services that may, by law, have to be terminated within a relatively short time period. Customers entering into contracts for such services would generally do so in reliance upon the continuing and long-term nature of such services. In another sense, one may question the vigor with which an entrant into a market will compete and the quality of the services it will offer, if its employees are burdened by the realization that, irrespective of their performance, their duty is only temporary and the office may be closed at any time. However, in view of the disposition of the instant proposal on other grounds, the Board is not required to decide at this time whether the possibility of such an adverse effect is of sufficient weight as to outweigh the public benefits that may reasonably be expected to derive from the instant proposal, notably the increased competition probably resulting from *de novo* entry.

In addition to the factors that the Board is, by statute, required to consider, the Board, in any particular case, must determine whether the proposal would be prohibited by State law. If the proposal would be so prohibited, the Board may not approve it.[5] In making such a determination, the Board will presume the constitutional validity of any pertinent State statute.[6] The interpretation and construction of controverted State statutes is a task that is not eagerly undertaken by the Board. Certainly, the courts of Florida are a more appropriate forum for the

5/ *Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965).

6/ See Statement accompanying the Board's Order of March 9, 1973, approving, to the extent permitted by State law, the proposal of NCNB Corporation, Charlotte, North Carolina, to operate a trust company in South Carolina through American Trust Company, 1973 Federal Reserve BULLETIN 305.

resolution of disputed questions of Florida law, than is the Board. Nevertheless, the Board believes that the principle laid down by the Supreme Court in the *Whitney* case requires the Board to initially resolve the legal issue presented here.

The issue which is determinative of the instant proposal is whether the "grandfather" provision of the recently-enacted legislation effectively permits BTNYC to initiate investment advisory services from a Florida office, albeit for an indefinite and temporary period of time. BTNYC states, and, the Board finds that BTIM was incorporated in the State of Delaware on November 24, 1972, at the direction of BTNYC, and that, on November 27, 1972, BTIM qualified with the Secretary of State of Florida to do business in Florida. However, BTNYC has not alleged that BTIM, at any time, has had a place of business in Florida or that BTIM has furnished investment advisory services in Florida. Nor could BTIM legally have done so, the prior approval of the Board not having been secured by BTNYC. It is not contended that BTIM is either a bank or trust company.

One the basis of these facts, BTNYC contends, and the protestants do not contend otherwise, that BTIM is a "business organization"; that BTNYC has "control" over BTIM and had acquired that control prior to becoming disqualified under the newly-enacted legislation. The protestants, on the other hand, contend that, irrespective as to whether BTIM is a "business organization" or whether BTNYC controlled BTIM prior to the effective date of the amendment, BTNYC is not entitled to "grandfather" benefits because BTIM did not furnish investment advisory services in Florida from a place of business in

Florida on the effective date of the legislation. In the Board's opinion, the conclusion is inescapable that the "grandfather" provison of the legislation only applies to a bank, trust company or business organization "having a place of business in [Florida] where or from which it furnishes investment advisory services in [Florida]" on the effective date of the legislation. Since BTIM is neither a bank or a trust company, and did not have on the date a place of business in Florida where or from which it furnished or provided investment advisory services, the Board concludes, as a matter of law, that BTNYC is not entitled to the benefits of the "grandfather" provision in section 659.141.

Furthermore, the legislative history of the legislation evidences a legislative intent to exclude BTNYC from engaging in the provision of investment advisory services in Florida from a Florida office. In view of the conflicting constructions given the "grandfather" provision, the Board believes that an examination of the legislative history of the legislation is appropriate to ascertain the legislative intent. It is beyond question, and BTNYC and the protestants are in agreement, that the notice that BTNYC published in September, 1972, triggered the action of the Florida Legislature in this case and that the newly-enacted legislation was primarily motivated by the threat of BTNYC's entry into the Florida investment advisory markets and was intended to prevent such entry. Accordingly, the Board concludes that, the "grandfather" provision was not intended to permit the instant proposal, even for a limited period of time.

BTNYC, besides contending that the Board should refrain from construing the newly-enacted Florida legisla-

tion, contends that they are entitled to "grandfather" benefits because the "grandfather" provision, which authorizes the Florida Banking Department to determine the length of time during which the statute shall not be enforced against a company entitled to "grandfather" benefits, constitutes an unconstitutional delegation of authority to that agency. As the Board has previously indicated, it will presume the constitutional validity of State statutes. BTNYC's challenge to the constitutionality of any provision of the recently-enacted Florida legislation is properly cognizable only by the judiciary. In brief, since the Board is of the opinion that the proposal is prohibited by State law, it believes that, under the doctrine set forth by the U.S. Supreme Court in *Whitney*, it must deny the propsal.

The Board is not unsympathetic with BTNYC when that holding company questions "the fairness and legality of a procedure whereby proponents of this legislation could prevent [its] proposal from becoming effective by filing objections with the Board and requesting a hearing and then, after hasty enactment of legislation, argue that this very legislation should be the basis for the Board to bar approval of [its] proposal." There is substantial evidence that the celerity with which the legislation was enacted is directly attributable to the pendency of the instant proposal before the Board. However, section 7[7] of the Act expressly reserves to the States the authority to

7/ Section 7 of the Act provides:
The enactment by the Congress of the Bank Holding Company Act of 1956 shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof. (12 U.S.C. 1846).

adopt legislation in the exercise of their powers and jurisdiction with respect to banks, bank holding companies, and their subsidiaries, and the U.S. Supreme Court in *Whitney* expressly instructed the Board to consider the applicability and the effect of any such legislation. Accordingly, irrespective of any doubt the Board may entertain as to the wisdom or desirability of a particular State enactment, the Board must, and will, respect, and act in the light of, pertinent State legislative judgments.

Based upon the record and for the reasons expressed herein, the proposal of BTNYC Corporation to provide investment advisory services in Florida through the instrumentality of BTIM, is hereby denied.

By order of the Board of Governors, effective April 26, 1973.

Voting for this action: Vice Chairman Robertson and Governors Daane, Brimmer, Sheehan, and Bucher. Absent and not voting: Chairman Burns and Governor Mitchell.

(Signed) CHESTER B. FELDBERG,
[SEAL] Assistant Secretary of the Board.

1. The pertinent portion of § 659.141(1), Fla. Stat. (1972 Supp.) provides:

659.141 Control; ownership.—

(1) Except as provided in subsection (3) of this section, no bank, trust company, or holding company, the operations of which are principally conducted outside this state, shall acquire or retain, directly or indirectly, all or substantially all the assets of, or control over, any trust company having a place of business in this state where trust business or functions are conducted, or acquire or retain all or substantially all of the assets of, or control over, any business organization having a place of business in this state where or from which it furnishes investment advisory services to trust companies or banks in this state.***

2. The pertinent portion of 12 U.S.C. § 1841(b) (1976) provides:

(b) "Company" means any corporation, partnership, business trust, association, or similar organization, or any other trust unless by its terms it must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the effective date of the trust, but shall not include any corporation the majority of the shares of which are owned by the United States or by any State.

12 U.S.C. § 1841(c) (1976) provides:

(c) "Bank" means any institution organized under the laws of the United States, any State of the United States,

the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans. Such term does not include any organization operating under section 25 or section 25(a) of the Federal Reserve Act, or any organization which does not do business within the United States except as an incident to its activities outside the United States. "District bank" means any bank organized or operating under the Code of Law for the District of Columbia.

3. The pertinent portion of 12 U.S.C. § 1842 (1976) provides:

§ 1842. Acquisition of bank shares or assets—Prior approval of Board as necessary; exceptions; disposition, time extension; subsequent approval or disposition upon disapproval

* * *

Limitation by State boundaries

(d) Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State

bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

4. 12 C.F.R. § 225.4(b)(1) (1978) provides:

§ 225.4 Nonbanking activities.

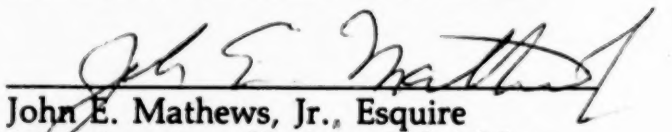
* * *

(b)(1) *De novo entry.* A bank holding company may engage de novo (or continue to engage in any activity earlier commenced de novo) directly or indirectly, solely in activities described in paragraph (a) of this section, 45 days after the company has furnished its Reserve Bank with a copy of a notice of the proposal (in substantially the same form as FR Y-4A) published within the preceding 30 days in a newspaper of general circulation in the communities to be served, unless the company is notified to the contrary within that time or unless it is permitted to consummate the transaction at an earlier date on the basis of exigent circumstances of a particular case. If adverse comments of a substantive nature are received by the Reserve Bank within 30 days after the company has so published its proposal[12] or if it otherwise appears appropriate in a particular case, the Reserve Bank may inform the company that (i) the proposal shall not be consummated until specifically authorized by the Reserve Bank or by the Board or (ii) the proposal should be processed in accordance with the procedures of paragraph (b)(2) of this section.

Proof of Service

I, John E. Mathews, Jr., attorney for BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION, Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 24th day of August, 1979, I served copies of the foregoing Motion to Affirm and Brief on Gerald A. Lewis, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida, by mailing 3 copies in a duly addressed envelope with postage prepaid to Eugene Cella, Esquire, his general counsel and attorney of record herein, The Comptroller's Office, The Capitol Building, Tallahassee, Florida, on Amicus Curiae, The Conference of State Bank Supervisors, by mailing 3 copies in a duly addressed envelope with postage prepaid to Erwin N. Griswold, Esquire, and James F. Bell, Esquire, Jones, Day, Reavis & Pogue, 1100 Connecticut Avenue, N.W., Washington, D.C. 20036, as counsel of record for said Amicus Curiae, and on Amicus Curiae, The New York Clearing House Association, by mailing 3 copies in a duly addressed envelope with postage prepaid to H. Rodgin Cohen, Esquire, Sullivan and Cromwell, 125 Broad Street, New York, NY 10004, as counsel of record for said Amicus Curiae.

MATHEWS, OSBORNE, EHRLICH,
McNATT, GOBELMAN & COBB



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